No. 2966

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BADER GOLD MINING COMPANY
(a corporation),
Appellant,

vs.

ORO ELECTRIC CORPORATION
(a corporation),
Appellee.

REPLY BRIEF FOR APPELLANT.

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Solicitors for Appellant.

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FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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We are fully aware of the rule, referred to by counsel, that the findings of the Master on questions of fact are presumably correct, and where based upon conflicting evidence or the credibility of witnesses are not subject to review. It was because of this rule that in its opening brief appellant stated as facts only those matters which were without controversy. On all other matters reference was made to the findings of the Master or to the respective contentions of the parties. The rule invoked, of course, has no application to matters upon which no finding was made or to

findings which are merely inferences from conceded facts.

The "re-statement" of facts made by appellee (pages 2 to 9 of brief for appellee), does not call for extended comment. The most of the matters therein contained were discussed in our opening brief. There are one or two statements, however, that require brief mention at this point.

Counsel state that the Nickerson Ditch was constructed "long prior to the date of the acquisition by defendant of the title to its property and the issuance of the patent therefor". It is entirely true that the ditch was constructed prior to the time that defendant took title to the property, but we think that counsel is mistaken in the statement that it was constructed prior TO THE ISSUANCE OF THE PATENT FOR THE LAND. The finding of the Master referred to certainly is not to this effect. He states that

> "both the Nickerson and the Powers Ditch proceeded across the land of the defendant long prior to the date when the defendant took title thereto".

This, of course, is not a statement that the ditches were constructed prior to the issuance of the patent for the land. A careful examination of the record fails to disclose any evidence whatsoever as to the time when the patent for the property, at this time owned by the defendant, was issued by the Government, and appellee's statement finds no support in the record. It is important to note this

because the argument of appellee on the legal questions involved is based almost entirely upon this assumption.

Counsel call attention to the fact that the Master found that after 1890 when the Powers Ditch went out of repair the Nickerson Ditch took all of the water in the summer flowing in Little Butte Creek at the Nickerson Dam. This statement is cited as justifying the conclusion that the predecessors of appellee had secured title to the waters of Little Butte Creek by adverse use. This is suggested at page 5 of appellee's brief and also at pages 30 and 31 thereof.

We had occasion in our opening brief to refer to this finding of the Master (pages 22 and 23). He expressly disclaimed any intention of finding on the water rights in Little Butte Creek. Thus at page 39 of the record he states:

> "So far as the second defense is concerned, therefore, there is no issue here as to the defendant's right in the waters of Little Butte Creek, nor any issue as to the enlargement of the ditch, nor any proper foundation for claim for damages."

Again at page 45 of the record he states:

> "I do not, for example, in this report, intend to find either as to plaintiff's title to the water in the Nickerson Ditch or as to the defendant's title by reason of the appropriation in 1899. If I am wrong in my conclusion as to the necessary presence of these issues the case will have to be referred again for findings."

At no place in his report did he find anything other than the bare fact that after 1890 the Nickerson Ditch took all the water in the summer flowing in Little Butte Creek. He did not designate the period or months of the year covered by the word "summer", nor did he find that the water so taken was taken under claim of right or adversely. At no place in his report did he indicate or suggest that the predecessors in interest of complainant had secured any right to the water in Little Butte Creek by prescription or otherwise. In view of these facts, and of his express disclaimer of making any finding upon the question of the water rights in the creek, his statement is not entitled to the weight which counsel would give it. On the contrary, it appears to us that if the Master had believed from the evidence that complainant's predecessors in interest had secured a prescriptive right to the waters in Little Butte Creek he would have found that fact and based his decision upon it rather than upon the proposition that as a matter of law the second affirmative defense was not well taken.

At page 5 of their brief counsel suggest that we were mistaken in our statement that the Powers Ditch was not included in the conveyance of the Oro Light & Power Company to Oro Electric Corporation. The suggestion is made that the conveyance included the "Walker and Wilson" or "West Ditch" and that these are the names by which the Powers Ditch was formerly known.

There is no occasion for any controversy about this statement since the deed from Oro Water, Light & Power Company to Oro Electric Corporation is in evidence (Plaintiff's Exhibit No. 9, Trans. p. 367). Neither the "Walker and Wilson" or "West Ditch" nor the "Powers Ditch" is named in the deed nor is the Powers Ditch comprehended by any terms used in the description.

It is also suggested, with reference to the absence of a conveyance of the Powers Ditch from Walter Cutting to Oro Water Company, that no such conveyance was necessary. This is based on the theory that Cutting's conveyance of the Nickerson Ditch to the Oro Water Company carried with it, as appurtenant to said ditch, all his rights in the waters of Little Butte Creek, which were formerly appurtenant to the Powers Ditch. This, of course, is based wholly on the assumption that the proprietors of the Nickerson Ditch had secured title to the waters of Little Butte Creek by adverse possession, an assumption which, as we have pointed out supra, is wholly unwarranted. Apart from this, any such conclusion is negatived by the very terms of Cutting's deed. He conveyed

> "That certain ditch and water right taken from the *west branch of the Feather River* at a point nearly opposite the village of Inskip * * * known as the Snow Ditch; also all additions to said ditch made by said parties of the first part (A. A. Nickerson, or his grantors) to convey the waters thereof to or near Paradise * * *".

It will be noted that the only water right referred to by Cutting is a water right taken *from the west branch of the Feather River,* and that no mention whatever is made of any water right in Little Butte Creek.

The other matters contained in counsels' statement of facts are sufficiently covered by the discussion in our opening brief, and we pass to the consideration of the points urged by appellee in support of the Master's view of the law applicable. Counsel follow the arrangement adopted in our opening brief, and for the sake of clarity, we will adhere to the same arrangement in this reply.

I-A.

In answer to our contention that the Master erred in ruling that complainant had made out a prima facie case and that the burden was upon the defendant to justify its act, counsel are content to quote the Master's reasons for such ruling and his comments thereon. Inasmuch as we have already discussed this statement of the Master (pages 47 and 48 of the opening brief), further discussion is unnecessary.

I-B.

Counsel discuss the ruling of the Master on defendant's second affirmative defense under four

headings. These will be answered in the order presented.

(1) It is contended in the first place that even had the defendant established its right to the use of the water of Little Butte Creek this fact would not have justified its entry upon complainant's ditch under the circumstances alleged in the second affirmative defense (brief for appellee, pp. 13 to 38).

The argument on this point is based almost entirely upon the assumption that the Nickerson Ditch was constructed prior to the issuance of a patent for the land now owned by the defendant. As we pointed out supra, there is no basis for any such assumption in the record. Apart from this, it is to be noted that the Master in discussing this defense did not base his ruling on any such assumed fact nor did he find it as a fact. Counsels' discussion in this connection is, therefore, beside the point.

We may add in this connection that even were it true that the Nickerson Ditch was constructed prior to the time of the issuance of the patent to the land now owned by defendants, counsels' conclusion would by no means follow. The only purpose of Congress in passing the Acts of 1866 and 1870 (see Revised Statutes, Sections 2339 and 2340) was to preserve to the appropriators of water on the public domain such rights as under the customs of the minors, with the acquiescence of

the Government, had become vested prior to the time that patents were issued for the lands. Congress was not concerned with the exact nature and character of the right which had been secured, leaving that to be governed by local law and custom. When property across which a ditch had been constructed passed into private ownership by reason of the issuance of a patent, the rights of the patentee and the ditch owner were left to be governed by general principles of law. There is nothing, of course, in the legislation of Congress that justifies the conclusion that it was its intention to exclude the patentee from the use of a ditch across its property where it could use it without any interference or obstruction of the use theretofore made by the ditch owner. This was a question with which Congress was not concerned, and one which, of course, did not enter into the reasons for the legislation. Counsel have cited no cases and we know of none which lend any support to their proposition.

Counsel point out that a right to a ditch is an entirely different thing from the right to the water flowing in the ditch, and that these two rights are capable of separate and distinct injuries giving rise to separate and distinct causes of action, for which there are separate and distinct remedies. This is the position that appellant has consistently and earnestly insisted on all through the trial and hearing of this cause, and is the same position taken by us in our opening brief. The

confusion in the case arises from the fact that complaint in its bill failed to distinguish between these two meanings comprehended by the word "ditch".

We do not for a moment question complainant's right to prevent the defendant from physically injuring the ditch, from breaking down its banks, from filling it up, or from doing other acts which would render it useless for the purpose of conducting water. Were complainant's action in this case solely for the prevention of such acts as these, and were the injunction confined to the commission of such acts, defendant would have no cause for complaint. But the primary purpose of complainant's action *was to prevent defendant from taking water out of the ditch,* even though it was taken without physically disturbing the ditch. In other words, while the right sought to be protected was simply described as a "ditch", it is obvious that of the two distinct rights comprehended within the meaning of that term the one it sought to protect *was an easement for the flowage of water across the land of defendant* and not its right to the mere physical conduit as such. This was admitted by appellee at the time of the hearing, was assumed as the situation by the Master, and was the theory upon which the entire case was heard and determined. Thus the Master states (Trans. p. 35):

> "The plaintiff, it will be noted, does not allege that it owns the water which flowed into that ditch. The question of ownership of water came into the case by reason of defendant's

> theory as to the law governing such matters, and in the course of the proceeding accordingly plaintiff replied with a large amount of evidence bearing on the question of its ownership of the water. The word "ditch" in ordinary parlance may mean two things: one, a right of way for water; two, the physical means by which this right is exercised. N. C. & S. C. Co. v. Kidd, 37 Cal. 282. The second is the restricted sense, referring to the instrument by which the right of way is made effective, and secondarily, is a more restricted sense distinguishing the open conduit from the dam and other works. While the allegation of injury to the bands made in the bill of complaint herein suggests the second meaning, it is otherwise sufficiently clear as by the allegation as to defendant's taking water from the ditch, that the right alleged by plaintiff and admitted to belong to him, refers to the first meaning of the word 'ditch'; *that is, a right of way or easement for conducting water across land.*"

We are to consider this case, therefore, as if instead of the words actually employed in the bill, the appellee had alleged that it "was the owner and in the possession of an easement to flow water across the land of the defendant in a certain ditch known as the Nickerson Ditch", and that "defendant obstructed and interfered with said easement by taking water out of said ditch". This fact is not to be lost sight of in seeking a solution of the question presented by defendant's second affirmative defense.

Even a casual examination of the cases cited by appellee shows that counsel wholly disregard the

very distinction they themselves make, and in support of a ruling made entirely with reference to one meaning of the term "ditch" cite rules and principles bearing solely on its other meaning. Notwithstanding the fact that appellee concedes that the right it is seeking to protect is an easement for the flowage of water, the primary sense in which the term "ditch" is used, it argues on the basis that the right involved is that to the physical conduit. It seems hardly necessary to say that such a process of reasoning throws no light whatever on the immediate question at issue.

It is not our intention to review in detail the cases cited. *In no one of these cases was any question of easement involved, nor was any question of the relative rights of a ditch owner and the owner of a servient tenement presented.* On the contrary, the right involved in every case cited was the right to the physical conduit. For example, in the case of Integral etc. Co. v. Altoona etc. Co., 75 Fed. 379, the sole question involved was whether water flowing in a ditch was a waterway within the meaning of the rule that ejectment does not lie for a waterway. The court held that a ditch was distinguishable from a natural waterway and was something more than a mere incorporeal hereditament and of such a nature that ejectment could be maintained for its possession. With this proposition, and it is the same proposition laid down by the other cases cited, we entirely agree. There can be no question, either on principle or on authority,

but that a ditch may be considered as connected and continuous and part and parcel of one entire and complete, fixed and immovable thing, and as such entitled to protection against trespass by one having no possible right or interest therein. This fact, however, has no pertinency whatever in the determination of the mutual rights of a ditch owner and the owner of private property across which the ditch extends where the right involved is not that of an entire physical property in the sense just noted but an easement for the flowage of water across the land in private ownership. Appellee's position in the ultimate analysis must rest solely upon the dicta in the Silver Creek case.

It is suggested that the right of complainant in the present instance is comparable with the right obtained by a railroad company for its right of way. Since it has been held that the right of way for a railroad company is exclusive, it is argued that the right of way here involved must also be considered exclusive. We do not think that counsel urge this proposition with any seriousness. In the first place, the decisions are not at all uniform even on the proposition that the railroad right of way is exclusive (33 Cyc., 189). Apart from this, there is no comparison between a ditch right and a railroad right of way in any possible view of the case. The cases which lay down the rule that the right of way of a railroad is exclusive is based on the fact that the right of way is a public highway. A ditch, of course, or the right

of way for water, is not of such character. So far as we know, the rule instanced by counsel has never been applied to any right of way other than that of a railroad. The case of Hoyt v. Hart, 149 Cal. 722, referred to in our opening brief, is, of course, a direct answer to this contention.

As we have heretofore pointed out, the Master, considering the facts to be immaterial, did not find upon the allegations of the second affirmative defense. Counsel for appellee. however, at pages 24 to 28 of appellee's brief, discuss the question whether the Nickerson Ditch was in fact enlarged in 1906 and the water diverted, the suggestion being that even if valid in point of law the second affirmative defense was not established as a matter of fact. Since appellee has entered into a discussion of this question, it is proper to point out that the allegations of the defense in this connection were proven by the overwhelming weight of the testimony.

Counsel, of course, call the court's attention only to those portions of the record which bear out their contention. They have entirely omitted the major portion of the evidence bearing on this question.

There is no controversy in the case but that in the fall of 1905 and in the spring of 1906 the Oro Water Company, the predecessor in interest of complainant, did extensive work on the entire length of the Nickerson Ditch. At that time the

company was preparing to take the water to the Kunkle Reservoir. The Company had some forty or fifty Chinese laboring on the ditch under the direction of one Murphy as foreman. The only controversy was as to the exact character of the work done at that time. The complainant contended that the ditch was merely "cleaned out". The point to be determined was not, however, just what term to apply to the work but just what effect the work had on the capacity of the ditch. The evidence shows without a question that the capacity of the ditch was increased at least six or seven hundred inches.

Defendant produced a number of witnesses who testified directly to the fact that the ditch was enlarged and its capacity increased. Thus Mr. Mowry testified directly to this fact and to the diversion of the water which resulted thereby (Trans. pp. 137, 138, 143 and 170). This was corroborated by the testimony of S. P. Moody (Trans. p. 123), by A. A. McCubbin (Trans. pp. 156 and 161), and by W. C. Bader (Trans. pp. 338 and 339). All of these witnesses testified that they had actually seen the work being done and there could be no possible question but that the ditch was enlarged and its capacity increased.

Complainant's own witnesses testified to the same effect. Thus C. M. Hendricks stated that undoubtedly the ditch at the north end of the Bader Mine, from his observation, had been enlarged (270, 271). C. W. Bader called by the complainant testified not

only to this effect, but to the direct fact that the water had been diverted thereby from the Little Butte Creek from the head dam of the Powers Ditch. The testimony of this witness is particularly interesting. His memory as to dates was very poor, but he was clear on the fact that the predecessors in interest of complainant had actually enlarged the ditch in 1906 and diverted all the water from the creek. Thus at page 245 of the record he testified as follows:

"Q. But when ordinarily mining you used only the Powers Ditch, did you not?

A. There was quite a while we used the Powers Ditch when drifting.

Q. And did not use the Nickerson Ditch?

A. Did not use it for awhile.

Q. That was for a number of years?

A. Until they took all the water out of Little Butte Creek; that dried up the flumes and they went out.

Q. Both summer and winter time you used the Powers Ditch?

A. Yes.

Q. In reference to the time that Murphy had the gang of Chinamen on there, do you know whether or not it was about that time that they took all of the water out of Little Butte Creek and turned it down the next ditch?

A. After they worked on the ditch?

Q. After Murphy worked on the ditch?

A. Yes.

Q. After that you could not get any water out of the Thompson Flat Ditch?

A. Could not get any water in the lower ditch.

Q. The water quit running in that after Murphy with his Chinamen had worked on the ditch?

A. Yes, he turned it all down the ditch."

In addition to the direct testimony as to the enlargement of the ditch and the diversion of the water, given both by witnesses for complainant and defendant, the physical facts demonstrate conclusively that such was the fact. G. B. North, a disinterested witness, testified that he supervised the ditch when originally built in 1888 and that it was built to carry 1000 inches of water with safety when first built and 1300 after it had settled down and had been used for a few years (Trans. p. 133). H. D. Gradon, an engineer employed by complainant company testified that he made measurements of the ditch in the month of May, 1913, and that at the time he measured the ditch there was actually flowing therein 1425 inches. He did not pretend to testify that the ditch would not carry any more than that amount, but that, in his opinion, it could not safely do so. W. L. Huber, a civil engineer, testified that from the profile and field notes taken by Mr. Grandon of the Nickerson Ditch it would safely carry forty second-feet when the ditch was filled to within four and a half inches below the top of the berm (Trans. p. 325). Further, and this one item absolutely disposes of complainant's contention, this figure of forty second-feet, or 2000 miner's inches, is the complainant's own estimate of the capacity of the ditch. On October 13, 1913, subsequent to the time Gradon made his survey, complainant, through its engineer, forwarded to the United States Forest Service a statement of its plant which included a statement of the capacity

of the Nickerson Ditch. From that it appeared that it estimated the capacity of the ditch at 40.1 second-feet (Trans. p. 320). Since the original capacity of the ditch did not exceed 1300 inches, it is too apparent for argument that the "cleaning" given the ditch in 1906 increased its capacity some 700 inches.

William Durbrow, the manager and chief witness for complainant, conceded that the 5-foot flumes which were originally on the ditch were changed to 6-foot flumes (Trans. p. 208). Increasing the size of the flume is wholly inconsistent with any theory that the ditch at that time was merely being "cleaned out" to its former capacity.

Appellee finds it necessary to urge that since no new dam was built at the time the work was done in 1906 there could have been no diversion of water. The suggestion is that the dam regulated the flow of the water in the ditch. This obviously is a mistake. Mr. North testified (Trans. p. 133) that the amount of the water in the ditch was regulated by the headgate of the ditch. He stated

> "These gates were always kept closed down so as to let just so much water under them and the rest flowed over the dam. If you were taking all the water into the ditch you would raise these gates up."

Clearly, the flow into the ditch was not regulated by the height of the dam but by the manipulation of the intake gates.

While we are on this subject it may not be amiss to direct the court's attention to the ruling of the Master excluding the testimony of the witness, B. L. McCoy, which ruling was excepted to and specified as erroneous (page 29, opening brief). While the trial was in progress appellant located this witness, a civil engineer, and the man who actually surveyed the Nickerson Ditch for the work done in 1905 and 1906. He still had his field notes made at that time. In view of the fact that there has been a great deal of controversy during the trial concerning the character of the work done, appellant called him to the stand to have it determined finally, and once and for all, exactly what was done. Much to our surprise, counsel for appellee strenuously objected to the questions asked him. These objections were sustained (Trans. pp. 382 and 383). If the Master had actually found that there had been no diversion of the water and no enlargement of the ditch in 1906, this ruling alone would justify a reversal. Apart from this consideration, the action of counsel for complainant in objecting to the testimony is an interesting commentary on their present contention.

(2) In our opening brief we suggested that the act of the defendant in taking the water out of the Nickerson Ditch after the water had been diverted, was justifiable as a self-remedy which could be availed of without breach of peace, and accordingly should be favored by a court of equity.

In answer to this suggestion counsel point out that no title or ownership to water of a stream is secured before it is actually taken in possession or reaches the point of diversion, and accordingly, that the principle of recaption to which we referred is not applicable (pages 28 and 29 of appellee's brief). We did not, of course, contend that the right to the use of water was a chattel or that the rule cited was directly applicable. Our only purpose was to show the approval given by the common law to a self-remedy where it is available, and to suggest that it should meet the same approval in a court of equity. While the title of water is not secured until actually in the possession, the right of riparian proprietor or appropriator to the waters of a stream is itself an important right and one, of course, which the law protects.

(3) Counsel admit that the Master declined to find upon the issue as to the water rights of Little Butte Creek, but they suggest that the Master found facts from which the legal conclusion that complainant's rights in the waters were superior to those of the defendant inevitably follows (pages 29 to 32, brief for appellee).

This suggestion is based almost entirely upon the statement of the Master that after 1890 when the Powers Ditch went out of repair the Nickerson Ditch took all the water in the summer flowing in Little Butte Creek at the Nickerson Dam. We have had occasion to refer to this state-

ment in our opening brief and also in this reply brief (supra, p. 3).

The general question as to the ownership of the waters of Little Butte Creek in 1906 is discussed at length in our opening brief, pages 7 to 27 inclusive, and there is no occasion to repeat here what was there said. We think that it is too plain for argument that the complainant not only failed to establish any right in and to the waters of Little Butte Creek, except to the water therein in excess of the amount which had been appropriated by Mr. Mowry, but that defendant by his appropriation secured a paramount and prior right.

One word may be added at this point concerning this general claim of complainant that the evidence establishes a prior right in its favor to the water of the creek. The right, if it secured any, must be based upon adverse use. As counsel themselves well stated, proof to establish title by adverse possession must be clear and satisfactory and the burden is upon the adverse claimant.

Mr. Weil describes the essentials for the acquisition of the right by adverse use or prescription as follows:

> "The following are the requisities for the loss and acquisition of a right by adverse use or prescription, viz.: The use must be continuous for the statutory period, exclusive (i. e. uninterrupted; i. e. peaceable), open (i. e. notorious), under claim of right (i. e., color of title), hostile, and an invasion of the other's

right which he has a chance to prevent, and taxes must be paid."

Water Rights in Western States, Vol. 1, Sec. 582.

It will be noted by a reference to the report of the Master that he does not find either the taking of the water from Little Butte Creek after 1890 was exclusive or under a claim or right, or hostile, or an invasion of a right which the defendant's predecessors had a chance to prevent. Counsel do not point to any evidence which proves, or even tends to prove, that the use by its predecessors in interest was of the character essential to give rise to a prescriptive title. On the contrary, to mention just two elements necessary for a prescriptive title, the evidence shows conclusively that the use was neither adverse nor under a claim of right.

From the year 1892 to the year 1899, when he filed his notice of appropriation, Mr. Mowry took all the water which he found necessary to use at the mine from the Nickerson Ditch. This water was taken with the knowledge, acquiescence and consent of McLoughlin and of Cutting, who were the owners during these years of the ditch. How possibly can it be contended that McLaughlin's and Cutting's taking of water from Little Butte Creek, if in fact the water was so taken, was adverse when Mowry's right to the water as a riparian proprietor was recognized to the extent of permitting him, without compensation, to take such water as he needed from

the ditch? These facts show conclusively that there was no adverse user during this period.

Furthermore, there was absolutely no claim of right or color of title whatever on the part of McLoughlin or Cutting to any of the waters flowing in Little Butte Creek, except the waters conducted therein by the Snow Ditch. Apart from Mr. Mowry's testimony that McLoughlin himself suggested and advised him to appropriate the natural waters of Little Butte Creek, this fact is shown by the descriptions in the deed from McLoughlin to Cutting (Trans. p. 360) and in the deed from Cutting to Oroville Water Company (Trans. p. 362). In both these deeds the water right referred to is that "water right taken *from the west branch of the Feather River* at a point nearly opposite the Village of Inskip". This action of McLoughlin and Cutting in expressly describing the water rights appurtenant to the Snow and Nickerson Ditch as taken from the west branch of the Feather River, is conclusive evidence that they claimed no title to the natural waters of Little Butte Creek. Counsel's suggestion, therefore, that unquestionably the user of the water was adverse to the world, including the defendant, is wholly without support in the evidence.

We have already answered at length the suggestion that complainant has a record title both to the Powers Ditch and water right and to the Nickerson Ditch and water right (see pages 20 et seq. opening brief).

In concluding the discussion of this point we would suggest that complainant well knew when it commenced this action that if its rights depended upon its ability to show prior right to the waters of Little Butte Creek, its chances of prevailing in the action were not of the best. Complainant's action in omitting from its bill any allegation whatever concerning its right to the water and its insistence that water rights were not involved, are explainable only on the theory that it knew that it would be exceedingly difficult to establish that fact. It preferred to base its action upon the dicta in the Silver Creek case, and thereby avoid, if possible, the necessity of going into such a question.

(4) It is suggested in the fourth place that

> "since the water in question was devoted to public use the defendant could not retake or recapture it, but that its remedy, if any, was an action for damages" (page 32, brief for appellee).

This is a rather remarkable proposition, and one which, of course, finds no support whatever in the cases cited.

The rule to which counsel adverts, but which they do not discuss, is well stated by the Supreme Court of California in the case of Barton v. Riverside, 155 Cal. 513, cited by appellee, as follows:

> "This rule, briefly stated, is that where one whose property is taken for a public use has stood by without objection, knowing that it was so taken and applied, and has allowed the pub-

> lic use to be instituted and carried on at great expense, and has permitted the people benefited thereby to adapt themselves to the new conditions and avail themselves of the conveniences and advantages thereby afforded, he cannot thereafter maintain an action to enjoin the continuance of such public use or to recover possession of the property so taken, but will be relegated to an action for damages."

In view of the fact that the second affirmative defense alleges that upon the diversion of the water defendant *immediately* retook it from the Nickerson Ditch on its property, it is obvious that no element of estoppel is present here, and that the rule referred to by counsel has no application whatever.

I-C.

Appellant contended in its opening brief that if its action in taking water from the Nickerson Ditch was not justified on broad principles of equity under the facts alleged in the second affirmative defense, it could at least be justified under the doctrine of the case of Hoyt v. Hart, 149 Cal. 722.

Counsel in answer to this suggestion contend that the case of Hoyt v. Hart holds only that it is legally possible for two parties to both hold, and have the right to the use of, a ditch, and suggest that the servient owner is not entitled to use the ditch *except where he has received a conveyance of the right to do so from the ditch owner or has secured a prescriptive right to do so* (pages 32 to 34, brief

for appellee). Needless to say, this proposition entirely ignores the doctrine expressly laid down in that case. No amount of argument or discussion can disguise the fact that it was there held directly and expressly that the general rule that a servient owner can use a right of way in any manner which does not materially impair or interfere with the enjoyment of the easement, is directly applicable to a ditch, and that a servient owner is entitled to use the conduit for the carriage and flowage of his own water so long as such use does not restrict or interfere with the right owned by the complainant.

II.

Appellant contended in its opening brief that if the burden was upon it to justify its acts, and if these acts could not be justified on any legal or equitable principle, at any rate it had been in the quiet, open, continuous and adverse possession of the right to conduct its water through the ditch for more than five years before the commencement of the action, and accordingly had secured a prescriptive right so to do. Exception was taken to the action of the Master in the finding against this prescriptive right, and it was pointed out that the findings that the water was taken only occasionally after 1906, that the use was not open, but on the contrary, surreptitious and that it was interrupted, were without support in the evidence.

Counsel in discussing this question (page 36, brief for appellee) do not dispute our contention that there is no substantial conflict of testimony on the fact that commencing with 1906 defendant used the water from the Nickerson Ditch continuously as its need required. Accordingly, we are justified in assuming that they do not question the correctness of this conclusion.

In support of the finding that the water was taken surreptitiously, they rely solely upon the testimony of Durbrow, Beik and Lincoln. The testimony of these witnesses was referred to by us at length in our opening brief, and we submit, as we there contended, that they afford no justification whatever for a finding that defendant took the water either surreptitiously, or without the knowledge of complainant.

A reference to the testimony referred to by appellee on the question of interruption shows, as stated in our opening brief, that the sole acts which could in any possible view of the case be considered as an interruption was the occasional closing of the Bader spillway and the occasional posting of a notice on defendant's gate. Counsel do not dispute the proposition that such acts are not interruptions in a legal sense unless they were brought home to the knowledge of defendant as the acts of complainant, nor do they question our statement that these acts were not as a matter of fact brought to the attention of the defendant. Concerning the suggestion that Mr. Mowry himself admitted such

interruptions, it will suffice to say that the portion of the record referred to only shows that he knew that the gate at times was shut down. He did not state, however, and there is no evidence that he knew who had closed the gate.

We submit, therefore, that the Master was not justified on the evidence in finding that the use by defendant of the Nickerson Ditch after 1906 was either occasional, or surreptitious, or interrupted.

(2) The second point of counsel on this question of prescriptive user is directed to the fact that all the taxes have been paid by complainant and its predecessors, and that no taxes have been paid by defendant. Though it is not so stated, we presume the point is that even had defendant taken the water continuously, openly and without interruption, it could not have secured a prescriptive title because of its failure to pay the taxes (page 37, brief for appellee).

It is a rule, of course, in California that the payment of taxes is an essential element in acquiring a prescriptive title. This rule, however, has no application to the acquisition of a prescriptive title to a portion of an easement. The adverse use by a servient owner of an easement possessed by another is not the acquirement of a right on the part of the servient owner, but a limitation of the right claimed by the dominant owner, and the payment of the taxes assessed on his land by the servient owner

fulfills the requirement (Smith v. Hampshire, 4 Cal. App. 8, 11).

(3) Counsel suggest in the third place that "A very insignificant part of the water taken by defendant has been put to beneficial use" (page 37, brief for appellee). They refer to no testimony showing the total amount of water taken by defendant and the proportion of that amount actually placed in use, nor is any evidence referred to which shows or tends to show that any part of the water taken by defendant was wasted. Extended discussion of this question, however, is unnecessary because appellee itself admits that defendant had beneficial use for at least forty or fifty inches of water. If it were the fact that it had no use for a greater amount, this does not, of course, justify the finding that it had not secured a prescriptive right to any amount.

(4) The final point made by appellee is that since both the ditch and water were dedicated to public use no prescriptive right could be acquired in either so long as such use was continued. This proposition is stated but not discussed (page 37, brief for appellee).

It is true that it has been held that a prescriptive right cannot be obtained to a right of way of a railroad company. This is based on the theory that a railroad right of way is a public highway (see Southern Pacific Co. v. Hyatt, 132 Cal. 240, cited

by appellee). We know of no case, and none has been cited, extending this doctrine to any other public service corporation. The rule is not based upon the fact that the railroad right of way is dedicated to public use but solely on the fact, as just indicated, that it is in its nature a public highway.

Counsel throughout their brief constantly refer to the farmers at Paradise. Indeed, it is asserted that the controversy here is one between the "complainant and the farmers at Paradise" and the defendant. The purpose of this statement is, of course, to make it appear that defendant is not justified in insisting upon its rights and that in doing so it ignores the public interest.

If the complainant had been as solicitous of the rights of the farmers in 1906 as they are at this time, it would have been a simple matter to have resorted to its right of condemnation and taken over the rights of defendant in Little Butte Creek and paid therefor a proper compensation. It cannot now justify its wrong by any reference to the public interest or the public rights. In this connection some observations of Mr. Justice Sloss in the case of Miller & Lux v. Madera Canal Co., 155 Cal. 59, are in point:

> "Neither a court nor the legislature has the right to say that because such water may be more beneficially used by others it may be freely taken by them. Public policy is at best a vague and uncertain guide, and no consideration of policy can justify the taking of private

property without compensation. If the higher interests of the public should be thought to require that the water usually flowing in streams of this state should be subject to appropriation in ways that will deprive the riparian proprietor of its benefit, the change sought must be accomplished by the use of the power of eminent domain. The argument that these waters are of great value for the purposes of storage by appropriators and of small value to the lower riparian owners defeats itself. If the right sought to be taken be of small worth, the burden of paying for it will be great. If, on the other hand, great benefits are conferred upon the riparian lands by the flow, there is all the more reason why these advantages should not, without compensation, be taken from the owners of these lands and transferred to others."

We submit that the theory adopted by the trial court in the conduct of this case was an erroneous one, and that as a result of its application defendant has been greatly prejudiced.

Dated, San Francisco,
June 18, 1917.

Respectfully submitted,
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Arthur H. Brandt,
Solicitors for Appellant.